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CASE NO. 90-672

in the Supreme Court of the United States

October Term, 1990

GARY PLASTIC PACKAGING CORPORATION,
a New York corporation,
for itself and all others similarly situated,

Petitioner,

vs.

MERRILL, LYNCH, PIERCE,
FENNER & SMITH, INC.,
a Delaware corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Gary Plastic Packaging Corporation ("Gary Plastic"), pursuant to Rule 15.6 of the Rules of this Court, replies to matters first raised in the Brief in Opposition to its Petition for a Writ of Certiorari filed by Respondents Merrill

Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Merrill Lynch Money Markets, Inc. ("Money Markets").

FACT ISSUES

Respondents state in their Brief in Opposition that Gary Plastic's shareholders relied on the representations of their broker, Howard Schur and did not rely upon "any writings from Merrill Lynch." (Opposition 4)[1] This is demonstrably incorrect. This statement overlooks the critical fact that Merrill Lynch's written representations in a 1980 internal bulletin regarding Merrill Lynch's CD program, and material omissions therefrom, formed the basis for all oral representations by any Merrill Lynch broker, including Howard Schur, to a Merrill Lynch customer. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 233-236 (2d Cir. 1985); *Gary Plastic Packaging Corporation v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 119 F.R.D. 344, 345-346 (S.D.N.Y. 1988); (Petition 5-6). The bulletin was distributed to Merrill Lynch brokers and was intended for use by account executives. It was used to train account executives to market the CDs. (App. 68-69, 73-74).

Respondents similarly take liberties with the facts by stating that Gary Plastic "had continued to purchase CDs even after it had discovered the alleged fraud" (Opposition 2), and that it had made "subsequent purchases" (Opposition 4) of Merrill Lynch CDs in 1982—adding only as an afterthought that these so-called "purchases" were actually rollovers of the original CDs.

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[1] References to Respondents' Brief in Opposition, filed November 21, 1990, will be referenced as "Opposition ___." References to the Petition for Writ of Certiorari filed October 22, 1990, by Gary Plastic will be designated as "Petition ___" and references to the Appendix attached to the Petition for Certiorari will be designated as "App. ___." *See* Petition ii for compliance with S.Ct.R. 29.1.

(Petition 5) There is ample evidence that such rollovers were *not* approved by Gary Plastic's president, Gary Hellinger, as set forth clearly in his deposition testimony. App. 62-67; Petition 7.

Furthermore, Respondents improperly seek to raise issues regarding class counsel that are not before this Court. (Opposition 5) The Second Circuit did not decide whether the district court had erred in disqualifying counsel. Respondent's comments on this issue are therefore, at best, superfluous and should be disregarded. They can only be intended as a subliminal effort to divert this Court's attention from the issues raised, and therefore also should be seen as indicative of Respondents' lack of confidence in the merits of their position.

ARGUMENT

Reasons for Allowing the Writ

Contrary to Respondents' assertions, denial of class certification to the class of purchasers of Merrill Lynch CDs is not a matter that "can only be of concern to the parties and more particularly, to purported class counsel." (Opposition 6) The Second Circuit's opinion that Gary Plastic is not an adequate class representative raises important issues of public concern; the Second Circuit's decision in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990), directly contradicts its own cited precedent in *Green v. Wolf Corp.*, 406 F.2d 291, 295, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), in which the Second Circuit held that all factors affecting certification are to be construed liberally

"in light of the importance of the class action device in securities fraud suits." 803 F.2d at 179.[3]

Petitioner has demonstrated that "after a rigorous analysis," the requirements of Rule 23(a) have been satisfied. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); Petition pp. 15-23. Decisions cited by Merrill Lynch do not hold otherwise.[4] In fact, one of the cases Respondents cite, *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 597-8 (2d Cir. 1986), *supports* certification on the facts at hand. In the paragraph following the statement cited by Respondents, the Second Circuit states as follows:

> Some courts have recognized, as we do, that the primary thrust of *Falcon* was that satisfaction of Rule 23(a) requirements may not be *presumed*. *Weiss v. York Hospital*, 745 F.2d 786, 810 & n. 37 (3d Cir. 1984) (holding that physician who actually applied for staff privileges at hospital could

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[3]While it is correct that the statute of limitations is tolled during appeals of class certification issues, *Crown, Cork & Seal Company, Inc. v. Parker*, 462 U.S. 345 (1983), the fact remains that Gary Plastic is the only class representative that has ever come forward to represent the large class of defrauded investors who bought Merrill Lynch CDs during the operative period. It is unlikely at this point that anyone will intervene as substitute representative to preserve the rights of the class, or that any investors have the enormous resources and time required to bring individual suits if certification is denied. The end result remains the same. Thousands of defrauded investors will be realistically without relief if the class represented by Gary Plastic is not certified.

[4]*Sheehan v. Purolator, Inc.*, 839 F.2d 99, 102 (2d Cir. 1988) upheld denial of class certification, not because the proposed representatives were inadequate, but because of "lack of class-wide proof of an aggrieved class." *In Robinson v. Lehman*, 771 F.2d 772, 783 (3d Cir. 1985), another employment discrimination case, class certification was denied because the numerosity requirement was not met; adequacy of the class representative was not in issue. *Cf. Jordan v. County of Los Angeles*, 713 F.2d 503 (9th Cir. 1983) (employee complaining of one employment practice cannot represent employees complaining of another practice).

> represent class including those dissuaded from applying by allegedly discriminatory policy in restraint of trade), *cert denied*, 470 U.S. 1060 (1985) . . . *See also Paxton v. Union National Bank*, 688 F.2d 552, 562 (8th Cir. 1982) (burden of showing typicality not onerous, but requires "something more than general conclusory allegations"), *cert. denied*, 460 U.S. 1083 (1983). [emphasis in original]

Second Circuit precedent after *Falcon* does not, as Respondent would have the Court believe, require that a proposed class representative must essentially prove the merits of his or her case and meet some insurmountable burden to qualify as a class representative. Rather, the Second Circuit and other circuits require only that a showing be made under Rule 23(a). They will not "presume" compliance any longer, but the burden of showing typicality is not "onerous." *Id.* As demonstrated in its Petition for Certiorari to this Court, Gary Plastic met this test. The Second Circuit's decision in Gary Plastic remains a glaring anomaly, at odds with that Circuit's own precedent. Most importantly, it flouts this Court's decisions in *Falcon* and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Like the class plaintiffs in *Rossini* (who were held to satisfy Rule 23(a) requirements of typicality), Gary Plastic was injured in the same fashion as the other class members. 798 F.2d at 596-598. All persons who bought the CDs were victimized by Merrill Lynch's deliberate concealment of their real method of creating the CDs. All persons who bought the CDs relied upon Merrill Lynch's representations, skill, and expertise. All class members suffered identical monetary damage: receiving interest rates on their Merrill Lynch CDs that were substantially lower than rates simultaneously available to any investor who purchased CDs directly from the issuing banks. Gary Plastic is a typical and adequate class representative and is not subject to unique

defenses sufficient to deny class representation. Apart from this, this Court's *Eisen* decision — issued before the decision below — taught that considerations on the merits were improper at the certification stage.

Merrill Lynch urges a determination on the merits of the alleged "unique defense" of reliance, in clear violation of this Court's admonitions in *Eisen, supra.* (Opposition 8-9) A denial of class certification on the basis of a putative affirmative defense is an improper preliminary determination of the merits of Gary Plastic's claim. *See Tenant v. Peoria & P.U. Railway Co.,* 321 U.S. 29 (1944). Nothing in the language or history of Rule 23 "gives a court any authority to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action." *Eisen,* 417 U.S. at 177.

Gary Plastic is in no way required to prove all the elements of reliance at the class certification stage, as urged by Respondents at page 9 of their Opposition. In point of fact and law, even on the merits, Gary Plastic is entitled to a presumption of reliance because misrepresentation occurred by reason of an omission or failure to disclose by the defendants in the 1980 bulletin. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153, *reh. denied,* 407 U.S. 916 and 408 U.S. 931 (1972); *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988); *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), *cert. denied,* 110 S.Ct. 843 (1990). Gary Plastic and all class members relied to their detriment on Merrill Lynch and Money Market's failure to disclose material facts, including the fact that Merrill Lynch's selected financial institutions offered their CDs at higher rates directly to purchasers, and that Merrill Lynch was acting on behalf of the financial institutions rather than on behalf of its customers in setting CD rates. (Petition 9-10). Merrill Lynch's right under *Basic v. Levinson* to try to rebut the presumption of reliance at trial cannot preclude class certification. *Blackie v. Barrack,*

524 F.2d 891, 907 n.22 (9th Cir.), *cert. denied*, 429 U.S. 816 (1975).

As set forth by this Court in its decision in *Basic*, the greatest concentration of effort at trial will be spent by Gary Plastic in proof of the materiality of the Merrill Lynch omissions. Such proof clearly benefits the entire class. Only after Gary Plastic, as class representative, has met this burden can Merrill Lynch submit evidence to rebut reliance. 108 S.Ct. at 980. Yet, as noted by the Second Circuit in *DuPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987), a case cited by Merrill Lynch:

> The finding of materiality by its very nature establishes that the information omitted would have been considered important by investors generally. It thus will be only the unusual case in which compatible findings of materiality and nonreliance can be made.

In short, materiality — not reliance — is the central issue to be proved at trial of this case. Rebuttal of reliance, while undoubtedly attempted by every 10b-5 defendant, *see Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983), is a secondary issue, not even reached until plaintiff's evidence of materiality — the meat of a 10b-5 fraudulent omission case — has been presented. *Id.* It is therefore logically impossible for such a rebuttal issue to become the focus of this litigation.[4]

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[4]Other decisions cited by Respondents are in no way apposite to the facts at hand. In *Zenith Laboratories v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.), *cert. denied*, 429 U.S. 828 (1976), the proposed class plaintiff was atypical because he had brought earlier individual suits against defendant, subjecting the class to rulings of res judicata based on the disposition of Zenith's counterclaims in the earlier suit. Gary Plastic has no such problems.

(Footnote continued on next page)

CONCLUSION

The Second Circuit Court of Appeals abused its discretion in denying class certification. Gary Plastic respectfully requests that this Court issue a writ of certiorari to the Second Circuit Court of Appeals and hold that the plaintiff class may be certified.

Respectfully submitted,

Guy B. Bailey, Jr.
Counsel of Record for Petitioner

(Footnote continued from previous page)

The Plaintiff in *Koos v. First National Bank of Peoria*, 496 F.2d 1162 (7th Cir. 1974), also had the fundamental problem of being possibly exempt from the very usury provision that was the basis of suit. A possible fact issue on a secondary reliance issue as to Gary Plastic is certainly not of the same magnitude and does not defeat certification.

In *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984) the "atypical" plaintiff was a securities broker and sophisticated investor; Gary Plastic is not.